

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICKEY DALE CORDELL,

Defendant-Appellant.

UNPUBLISHED

July 11, 2006

No. 260398

Macomb Circuit Court

LC No. 02-001124-FC

Before: Kelly, P.J., and Markey and Meter, JJ.

PER CURIAM.

This is the second time this case has been before this Court. Following a jury trial, defendant was convicted of two counts of criminal sexual conduct (CSC) in the first degree, MCL 750.520b(1)(b). In defendant's first appeal of right, we affirmed defendant's convictions, but identified a scoring error and so vacated defendant's minimum sentence of 180 months' imprisonment, and remanded for resentencing. *People v Cordell*, unpublished opinion per curiam of the Court of Appeals, issued September 28, 2004 (Docket No. 249020). On remand, the trial court reduced the minimum sentence and sentenced defendant to serve concurrent terms of imprisonment of 135 to 300 months for each conviction. Defendant appeals as of right. We affirm. This case is being decided without oral argument in accordance with MCR 7.214(E).

Defendant's sole issue is whether the trial court erred in sentencing him partly on the basis of facts found by the court, not by the jury.

This Court reviews a sentencing court's factual findings for clear error. See MCR 2.613(C); *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995). However, the proper application of the statutory sentencing guidelines presents a question of law, calling for review de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001).

Not in dispute is that defendant's sentence fell within the recommended range under the sentencing guidelines, albeit at the top of that range. "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10).

In this case, defendant asserts as a scoring error that the trial court assessed points for Offense Variable (OV) 13, for which 25 points are to be scored where "[t]he offense was part of

a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(1)(b). Defendant points out that he was acquitted of additional CSC charges, and argues that the trial court was not entitled to assess points on the basis of its own conclusion that he committed more acts of CSC than what the jury determined beyond a reasonable doubt. Defendant relies on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), where the United States Supreme Court held that “every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment.” *Id.* at 313 (emphasis in the original).

However, this issue was ripe for presentation in the first appeal as of right, not in this one. The trial court at resentencing impliedly reiterated its findings from the original sentencing proceeding to justify sentencing defendant at the high end of the recommended range under the guidelines. At the earlier sentencing, the court expressly chose to assess points for OV 13 on the basis of its conclusion that defendant committed acts of CSC beyond those reflected in the jury’s verdict. Although it was in response to an objection that the trial court discoursed on OV 13 at the original sentencing, at resentencing defendant personally agreed that the guidelines were properly calculated as they then stood, and there was no mention of OV 13.

An appeal by right following a remand is limited to issues arising from the remand. *People v Jones*, 394 Mich 434, 435-436; 231 NW2d 649 (1975). In this case, the scoring of OV 13 was ripe for a challenge in the first appeal; nothing in this Court’s remand order, or the proceedings that followed, specifically engendered this issue, or added anything to it as it stood after the first sentencing. Because the proper opportunity to challenge the scoring of OV 13 was in the first appeal by right, it is not properly before this Court in the second.

Moreover, our Supreme Court has recently held that Michigan’s sentencing scheme does not offend the Sixth Amendment and observed that *Blakely*, *supra*, concerned an increase in a defendant’s maximum sentence in a determinate sentencing scheme, while this state’s guidelines govern the establishment of minimum sentences within an indeterminate framework. *People v Drohan*, ___ Mich ___; ___ NW2d ___ (Docket No. 127489, decided June 13, 2006). In addition, *Drohan* reiterated that the Michigan system is unaffected by the holding in *Blakely*” *Id.* at ___, citing *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004).

For these reasons, defendant is not entitled to appellate relief.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Patrick M. Meter